

PRESERVING INSTITUTIONS OF AUTONOMY IN HONG KONG: THE IMPACT OF 1997 ON ACADEMIA AND THE LEGAL PROFESSION

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I. INTRODUCTION

Recently the United Kingdom handed Hong Kong over to China. The Joint Declaration¹ and the Basic Law² provide that the local Hong Kong government shall enjoy a "high degree of autonomy" from the central government in China. However, it is well recognized that such autonomy can only be realized in the presence of strong local institutions—institutions that will resist intervention by China and exercise their powers in the interest of Hong Kong.

Thus far, Hong Kong's main governmental institutions—the Chief Executive, the legislature, and the judiciary—have not established themselves as particularly strong defenders of local autonomy. The first Chief Executive (appointed by the Chinese government) has been criticised for consulting Beijing on matters that are supposed to be outside its supervision.³ The Provisional Legislative Council (appointed because China dissolved Hong Kong's elected legislature) has also been extremely docile and has largely complied with China's wishes. When elections are held in the spring of 1998, Hong Kong can expect more assertive legislators. But as a result of the election law enacted by the Provisional Legislative Council, even the elected Legislative Council will be far less democratic than the one elected in 1995.⁴ Moreover, its power to check the executive branch is quite limited

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1. The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C. [hereinafter Joint Declaration], *reprinted in* 23 I.L.M. 1371.
2. BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, 1990 [hereinafter BASIC LAW], *reprinted in* 29 I.L.M. 1519 (1990).
3. See Peter Wesley-Smith, *The SAR Constitution: Law or Politics?*, 27 H.K. L.J. 125, 12728 (1997).
4. The legislature will include 20 members elected from geographic constituencies, 30 by "functional constituencies" and 10 by an election committee. In the 1995 elections, the functional constituencies were significantly widened (so that every working person could vote in one). However, for the 1998 elections, the functional constituencies have been narrowed again to small elitist groups. This is

under the Basic Law.⁵ Recent dicta by the Court of Appeal appears to reflect an unwillingness of the judiciary to check the actions of the central government.⁶ Therefore, the judiciary is also looking rather weak at the moment.

In such an atmosphere, it is crucial that Hong Kong's non-governmental institutions continue to be strong, independent, and willing to criticize the local and central governments. As Professor Yash Ghai has argued, the existence of a "vibrant civil society" is one advantage that Hong Kong has in its fight to avoid rigid control by China.⁷ Academia and the legal profession are important elements of that civil society. If these two institutions (and the individuals that work within them) lose their independence, then Hong Kong will lose part of what makes it so different from the rest of China.

This article thus explores the effect that the transition has had on the academic community and the legal profession. Section II discusses the preservation of academic freedom in Hong Kong. Section III addresses the legal profession, focusing mainly on its independence and the willingness of lawyers to support causes that are unpopular with the new regime. Section IV briefly considers the extent to which Chinese will replace English as the language of law and higher education, and the potential ramifications of this development.

particularly significant because any bill, amendment, or motion proposed by a member of the Legislative Council (as opposed to the government) must be approved by a simple majority of *both* groups of representatives (the functional constituency representatives and the other representatives). BASIC LAW, *supra* note 2, Annex II.

5. See BASIC LAW, *supra* note 2, art. 74.

6. In *HKSAR v. Ma Wai Kwan David*, [1997] 2 H.K.C. 315, the defendants argued that the offense that they had been charged with (the common law offense of conspiracy to pervert the course of public justice) was not a part of the law of Hong Kong after July 1, 1997 because: (i) Article 8 of the Basic Law (which provides that the common law shall be maintained in Hong Kong) was not self-executing; and (ii) the Provisional Legislative Council was unlawful and not competent to enact the Reunification Ordinance (which also stated that the common law survived after July 1, 1997). As the Court of Appeal decided that the Basic Law itself adopted the common law as part of the law of Hong Kong, it did not actually have to decide the challenge to the Provisional Legislative Council. However, the Court of Appeal stated (in obiter dicta) that Hong Kong courts had no jurisdiction to query the validity of the establishment of the Provisional Legislative Council, as this was an "act of the sovereign." *HKSAR v. Ma Wai Kwan David*, [1997] 2 H.K.C. 315. This dicta has created a great deal of controversy in Hong Kong as it raises the question of whether violations of the Basic Law by the central government can be addressed in the Hong Kong courts. See Johannes Chan, *The Jurisdiction and Legality of the Provisional Legislative Council*, 27 H.K. L.J. 374 (1997); Albert Chen, *The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts*, 27 H.K. L.J. 387 (1997).

7. YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 174 (1997).

II. PRESERVING ACADEMIC FREEDOM IN HONG KONG

A. Politics and the Universities

There are currently nine degree granting institutions in Hong Kong, including six universities. The universities are all government funded and there is increasing pressure on universities to be "accountable" for the funds provided.⁸ In an effort to create a "buffer" between the government and the universities, the University Grants Committee (the UGC) was established in 1965. It advises the government on the facilities, development and financial needs of the universities and is the major decision-maker in allocating resources among them. The UGC has traditionally included several members from outside Hong Kong (for example, from the UK, the USA and Australia). The Chief Executive of Hong Kong now appoints members and the extent to which the UGC will protect the autonomy of universities depends to a large degree on its future composition.⁹

University teachers are acutely aware of the challenges presented by the resumption of Chinese sovereignty. Since the signing of the Joint Declaration in 1984, academics (particularly those in law, education and the social sciences) have devoted an enormous amount of attention to issues related to the resumption of Chinese sovereignty over Hong Kong. Countless research projects and conferences have addressed developments associated with 1997, and a large body of literature has been produced on the subject.

Moreover, a significant number of academics have not simply studied the transition, but rather have become personally involved in Hong Kong's political and legal developments. Many university teachers have openly supported the human rights and "pro-democracy" movements. Others have chosen a very different path, adopting a more "conciliatory" (some would say "pro-China") position.

In and of itself, this divergence of views would be entirely natural in a university environment. What has created tension is the fact that many very senior academics and university leaders (including most of the vice-

8. Gerald Postiglione, *Hong Kong's Universities Within the Global Academy*, in HONG KONG'S REUNION WITH CHINA: GLOBAL DIMENSIONS 240 (Gerald Postiglione & James T.H. Tang eds., 1997). Universities do raise some of their own money. However, these funds are negligible when compared to the funding provided by the government.

9. *Id.* at 241.

chancellors and presidents of Hong Kong's universities) agreed to be appointed by China to various bodies overseeing the transition of sovereignty (including the important Preparatory Committee). Officially, these university leaders were appointed in their personal capacities and not as representatives of their institutions, but in reality, their appointments were widely recognized as a process of "co-option;" a deliberate strategy to reduce resistance among Hong Kong academics and create an impression that the universities supported actions taken by China during the transition.¹⁰

The academics and administrators who agreed to serve on these bodies were probably inspired by a variety of motives—including the genuine belief that a conciliatory approach to China could achieve the best possible deal for Hong Kong (and their own institutions) under the new regime. Indeed, it is certainly arguable that the participation of university leaders on these "pro-China" bodies may benefit their institutions in the long terms—China may feel less threatened by them and therefore be less inclined to intervene.

In the short term, however, the co-option of academics has created tension on Hong Kong's campuses. Naturally, academics continually discuss China's actions toward Hong Kong (such as its decision to dissolve the elected legislature and replace it with the appointed Provisional Legislative Council). In debating such issues (whether at a conference or merely over lunch), one cannot help but be aware of the role played by certain prominent members of the university community. The group at the next table might include a member of the Preparatory Committee (which established the Provisional Legislative Council) or another China-appointed body. Of course, that same professor might also sit on a university committee considering applications for promotion or research grants.

This tension will not necessarily disappear now that China has finally resumed sovereignty. Academics who support the democracy and human rights movements have opposed many of the actions taken by the Chief Executive and the Provisional Legislative Council since July 1997. Like other activists in Hong Kong, they are gearing up for the May 1998 elections and hope that the elected legislature will provide a more receptive forum for their views. Yet the Chief Executive has made it clear that he believes there has been "too much politics" in Hong Kong during the transition. The heads of our universities may well share that view. They may be anxious that their institutions not be viewed as sources of resistance to China.

10. For a discussion of the "co-option" process, see Law Wing-Wah, *The Accommodation and Resistance to the Decolonisation, Neocolonisation and Recolonisation of Higher Education in Hong Kong*, in *EDUCATION AND POLITICAL TRANSITION: IMPLICATIONS OF HONG KONG'S CHANGE OF SOVEREIGNTY* 5455 (Mark Bray & W.O. Lee eds., 1997).

University leaders may also receive quiet pressure (from influential conservatives) to ensure that public funds are not being used to challenge the local and central governments. Recently, Xu Si-min, a well-known Hong Kong publisher and member of the Chinese People's Political Consultative Conference, stated publicly that RTHK, Hong Kong's public radio station, is too critical of the Hong Kong and Chinese governments.¹¹ He claimed that he had already raised the issue several times with Hong Kong's Chief Executive, Tung Chee-hwa. Indeed, one report claimed that Tung receives at least one complaint a day about RTHK (from government officials and also from people in the private sector who are well-connected to China).¹² Their position appears to be that as RTHK is funded by tax revenues it should be supportive of the Hong Kong and Chinese governments (an interesting argument given that neither government is elected by the people who pay the taxes). Of course, Hong Kong's universities are also all publicly funded and could easily be subjected to the same kinds of pressure.

Thus, academics with views that conflict with those of the new regime may fear that they will be penalized for their political activities, their writings, or the views that they express in class or elsewhere.¹³ Indeed, there have already been a few instances (discussed in subsection D below) in which academic freedom has been openly challenged in Hong Kong.

B. Legal Provisions Purporting to Protect Academic Freedom

Given the tensions noted above, it is important to assess what legal protection exists for academic freedom in Hong Kong. I focus here on the

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11. The incident was front page news in Hong Kong. Xu's statement was particularly controversial in that he chose to make it when he was in Beijing for a meeting of the Chinese People's Political Consultative Conference. Many Hong Kong people interpreted this as an improper invitation by Xu for Beijing to interfere in Hong Kong affairs. Anson Chan (the second-highest official in the Hong Kong government, who was acting Chief Executive at the time as Tung Chee-hwa was also in Beijing) immediately condemned Xu's statement. Tung was more equivocal at first, but did eventually state (upon his return to Hong Kong) that RTHK would continue to enjoy editorial independence. See Chris Yeung and No Kwai-Yan, *Tung: RTHK Independent and a Matter for HK People*, S. CHINA MORNING POST, Mar. 7, 1998, at 1; *Value of Independence*, S. CHINA MORNING POST, Mar. 6, 1998, at 22 (editorial); No Kwai-Yan, *Who's Your Real Boss, Critic Xu Asks RTHK*, S. CHINA MORNING POST, Mar. 7, 1998, at 6. Tung's statement has not entirely reassured those who fear that pressure from China will eventually lead to increased restrictions on RTHK.
 12. See Danny Gittings, *RTHK Free, For The Moment*, S. CHINA MORNING POST, Mar. 8, 1998, at 12.
 13. For example, democrat Dr. John Tse Wing-ling (who teaches at City University) recently called for government guidelines to ensure that politicians who work at universities in Hong Kong are not penalized for their views. Miranda Ip, *Academics Defend Their Political Role*, S. CHINA MORNING POST, Oct. 9, 1997, at 25.

Joint Declaration and the Basic Law, as they both have specific provisions relating to education and academic autonomy in Hong Kong. However, the Bill of Rights Ordinance and relevant international human rights conventions are also briefly considered.

The Basic Law is now the highest law in Hong Kong and any locally enacted law that contradicts it should be held invalid by the courts. The enforceability of the Joint Declaration is less certain. Now that China has regained Hong Kong, the Chinese government may argue that Hong Kong is an internal matter, rather than a subject of international law. However, the Joint Declaration is a binding treaty and the international community should continue to monitor China's compliance with it and other relevant rules of international law.¹⁴

In assessing the extent to which the Basic Law and the Joint Declaration protect academic freedom in Hong Kong, it is useful to consider three possible relationships in which "academic autonomy" might be asserted: (1) the autonomy of the Hong Kong *government* to operate its own educational system and set policies that differ from those of the central government; (2) the autonomy of academic *institutions* (from the Hong Kong and central governments); and (3) the autonomy of *individual* academics (in teaching, research, participating in local politics, and expressing dissent on campus). With respect to the first relationship identified above (between the central and Hong Kong governments), both the Joint Declaration and the Basic Law provide very detailed language. For example, Annex I to the Joint Declaration states at Article 10:

The Hong Kong Special Administrative Region shall maintain the educational system previously practised in Hong Kong. The Hong Kong Special Administrative Region government shall on its own decide policies in the fields of culture, education, science and technology, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications.

14. See generally RODA MUSHKAT, ONE COUNTRY TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG (1997). See also Roda Mushkat, Comment, *Scrapping Hong Kong Legislation: An International Law Perspective*, 27 H.K. L.J. 12 (1997), where she argues that the decision by the Standing Committee of the National People's Congress to repeal or amend certain Hong Kong legislation (including the Hong Kong Bill of Rights Ordinance) must be evaluated in terms of whether it is consistent with China's obligations under the Joint Declaration and the rules of international law (and not just in terms of its compliance with the Basic Law).

This language makes it very clear that Hong Kong is entitled to operate a separate education system and to embrace different educational policies from those of the central government. The Basic Law essentially repeats this promise.¹⁵

The legal provisions relating to the second relationship (between the government and educational institutions) are also reasonably detailed. Annex I, Article 10 of the Joint Declaration goes on to provide that:

Institutions of all kinds, including those run by religious and community organisations, may retain their autonomy. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region.

The Basic Law contains similar language, and indeed is arguably stronger than the corresponding provision of the Joint Declaration (a rare phenomena) in that it expressly mentions academic freedom. Article 137 provides:

Educational institutions of all kinds may retain their autonomy and enjoy academic freedom. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Schools run by religious organizations may continue to provide religious education, including courses in religion.

However, given that so many university leaders appear to have adopted "pro-China" positions, the key issue is not so much institutional autonomy, but rather the autonomy of individual academics. This issue is particularly important because academics in Hong Kong have already reported that policy making in their universities is becoming increasingly "centralized," with little opportunity for the general faculty to influence academic policies at the institutional level.¹⁶ It is also noteworthy that Hong Kong university teachers apparently perceive academic freedom to be less highly valued in their own institutions than in Hong Kong generally. In 1993, less than half of university teachers surveyed felt that the administrations in their institutions

15. Article 136 of the BASIC LAW, *supra* note 2, states:

On the basis of the previous educational system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards, and the recognition of educational qualifications.

16. Postiglione, *supra* note 8, at 254-55.

supported academic freedom.¹⁷ Given the political role played by university leaders since 1993, that percentage is probably even lower today.

Thus, we cannot assume that the leaders of Hong Kong's universities will use the autonomy given to them under the Basic Law to protect academic freedom. There is a danger that they will publicly embrace academic freedom, while actually adopting policies that tend to inhibit it (as a means to avoid confrontation with the new regime). As Law Wing-Wah commented, the top-level administrators and academics who were co-opted by China "were, at least on the surface, willing to abide by the rules of the game prescribed by the PRC Government. If they continue to do so . . . resistance by higher education from the top against the new SAR Government would likely be reduced."¹⁸

Thus, the legal provisions of greatest concern are those that apply to *individual* academic freedom. Unfortunately, these provisions are significantly less detailed than those relating to institutional autonomy. The *education* sections of the Joint Declaration and Basic Law actually contain no reference to the freedom of individual academics. However, in a section on general rights, the Joint Declaration does list "academic research" as one of the "rights and freedoms" that will be "protected by law."¹⁹ Similarly, the Basic Law (in the chapter on fundamental rights and duties of residents), states that "Hong Kong residents shall have freedom to engage in academic research, literary and artistic creation, and other cultural activities."²⁰

It is not clear why individual academic freedom is mentioned here rather than in the sections devoted to education. What is noteworthy is that these brief references mention only academic *research*. Neither the Joint Declaration nor the Basic Law makes any reference to the autonomy of individual academics with respect to teaching or political activities. In those areas, academics would have to rely on the legal provisions of the Joint Declaration and Basic Law that apply to the community generally (rather than just to academia), such as those protecting free expression and opinion.²¹

17. *Id.* at 25658, 262.

18. Law Wing-Wah, *supra* note 10, at 55.

19. Joint Declaration, *supra* note 1, ¶ 3(5) and Annex I, art. XIII.

20. BASIC LAW, *supra* note 2, art. 34.

21. See Joint Declaration, *supra* note 1, ¶ 3(5) and Annex I, art. XIII; and BASIC LAW, *supra* note 2, art. 2739.

The Hong Kong Bill of Rights Ordinance²² (which is based upon the International Covenant on Civil and Political Rights (the ICCPR)) does not expressly mention academic freedom. But it does contain many relevant provisions, such as those protecting freedom of opinion, expression, assembly and association, and the right to participate in public life.²³ The Bill of Rights binds only the government, public authorities, and their agents.²⁴ Fortunately, however, universities have been held to be "public authorities" for this purpose.²⁵ The Bill of Rights Ordinance is an ordinary law and is not superior to laws enacted subsequent to it. However, the Basic Law (which is superior law) expressly provides that the ICCPR (on which Hong Kong's Bill of Rights is based) shall remain in force and be implemented through the laws of Hong Kong.²⁶ Thus, an academic should be able to use the Basic Law to challenge any laws that are inconsistent with the ICCPR and the Bill of Rights.

Moreover, academics could also seek to rely upon the international human rights conventions as such. Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (the ICESCR) continue to apply to Hong Kong (by virtue of express provisions in the Joint Declaration²⁷ and the Basic Law²⁸). In recent years, non-governmental

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22. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG, ch. 383 (1991). The Bill of Rights Ordinance was proposed in late 1989 (as part of the Hong Kong government's efforts to rebuild public confidence after the Beijing massacre in June, 1989) and enacted in 1991. Beijing opposed its enactment and originally threatened to repeal the entire ordinance in 1997. Instead it deleted only sections 2(3), 3, and 4, which relate to its interpretation and application to legislation. See *Decision of the Standing Committee of the National People's Congress on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the Standing Committee on Feb. 23, 1997 (an English translation of which appears at 27 H.K. L.J. 419 (1997)). It has been argued that these deletions should have no effect on the application of the Bill of Rights, as they simply stated common law rules that should be applied by a court in any event. See, e.g., Yash Ghai, *The Continuity of Laws and Legal Rights and Obligations in the SAR*, 27 H.K. L.J. 136, 14243 (1997). However, if Hong Kong judges become less independent, it is certainly possible that they "may be tempted to rely on the repeal to argue for a narrow and less purposive interpretation of the Bill of Rights." *Id.*
 23. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG, ch. 383, art. 1518, 21, § 8.
 24. *Id.* ch. 383, § 7. For further discussion of § 7 and its implications, see Andrew Byrnes, *The Hong Kong Bill of Rights and Relations Between Private Individuals*, in *THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH* (Johannes Chan & Yash Ghai eds., 1993).
 25. Hong Kong Polytechnic Univ. v. Next Magazine Ltd., [1996] 6 H.K.P.L.R. 117, 12324 (High Court).
 26. BASIC LAW, *supra* note 2, art. 39, provides that the provisions of the ICCPR and the International Covenant on Economic, Social and Cultural Rights "shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."
 27. The provisions of the ICCPR and the ICESCR "as applied to Hong Kong shall remain in force." Joint Declaration, *supra* note 1, Annex I, art. XIII.
 28. See BASIC LAW, *supra* note 2, art. 39.

organizations in Hong Kong have regularly made submissions to the Human Rights Committee. These submissions have supplemented the information provided by the Hong Kong government (via the British government) and can be relied upon by the Committee in its assessment of the extent to which Hong Kong is complying with international human rights law.

C. Enforcing Laws Protecting Academic Freedom

As demonstrated above, a restriction on academic freedom (whether by the government or by an institution) could be challenged in court. In the event of a blatant violation of academic freedom (such as an express policy prohibiting certain statements in research or teaching), I am reasonably confident that the Hong Kong courts would enforce the relevant legal provisions. However, no one actually expects such an open attack. The official position of Hong Kong's universities and the Hong Kong government will certainly continue to be one of supporting academic freedom.

My concern lies with the less obvious restrictions, for example, the fear that an academic will be disadvantaged, perhaps even dismissed, if she regularly writes articles critical of the local or Chinese governments. Universities may remove controversial teachers to avoid confrontation with China. They may even receive quiet pressure from high-placed persons in Hong Kong who (like the critics of RTHK) believe that publicly funded institutions should not oppose the government.

Of course, non-tenured academics are particularly vulnerable to such covert restrictions on academic freedom. A 1993 survey reported that less than half of Hong Kong's tertiary level teachers were tenured.²⁹ The percentage has probably dropped further since then, as Hong Kong's universities have made a conscious decision to move away from tenure (known as "substantiation" in Hong Kong) to a system of renewable contracts. Thus, many university teachers in Hong Kong are not even given the opportunity to apply for tenure. Clearly, this makes faculty more vulnerable to pressure from university administrators and senior academics. In the absence of tenure, a decision not to renew a contract is very difficult to challenge. It is for this reason that international declarations on academic freedom urge universities to establish a system of tenure for teachers.³⁰

29. Postiglione, *supra* note 8, at 242.

30. For example, the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education provides at Article 5 that "institutions of higher education shall guarantee a system of stable and secure employment for teachers and researchers. No member of the academic community shall

Indeed, even a case of retaliation against a *tenured* faculty member would not necessarily be challenged in court in Hong Kong. It is extremely expensive to sue in Hong Kong. Legal fees are among the highest in the world and lawyers are not permitted to act on a contingency fee basis.³¹ Moreover, because the costs rules are the opposite of those in the United States, courts normally make orders of costs against the loser. Thus, one has to be very confident of winning a lawsuit before taking the decision to sue one's employer. Even if a tenured academic successfully sues his or her institution, it is not at all clear that the court would order that the academic be reinstated. Under Hong Kong contract law, there is a strong presumption against ordering specific enforcement of an employment contract even if the employee is seeking reinstatement.³² This common law presumption has been modified somewhat by recently enacted statutory provisions. For example, in cases of dismissals due to gender or disability, the relevant legislation expressly states that the court may make an order of reinstatement.³³ However, this is a discretionary remedy and it is questionable whether Hong Kong courts would ever order it over the opposition of the employer.

The famous *Jill Spruce*³⁴ case (although not a case involving academic freedom) illustrates the difficulties of obtaining an order of reinstatement against a university in Hong Kong. Jill Spruce was a tenured senior lecturer in the Faculty of Law of the University of Hong Kong. She also engaged in outside practice as a barrister, despite the fact that her head of department had expressly withdrawn his permission for her to do so. This contravened the University's "outside practice" regulations and she was dismissed. Spruce applied to the High Court for an order of certiorari to quash the decision to dismiss her. Her application failed in the High Court and she

be dismissed without a fair hearing before a democratically elected body of the academic community." Lima Declaration at art. 5, reprinted in ACADEMIC FREEDOM 3, Annex 1 (1995).

31. See CODE OF CONDUCT FOR THE BAR OF HONG KONG, ¶ 124 [hereinafter BAR CODE]; MICHAEL SANDOR & MICHAEL WILKINSON, THE PROFESSIONAL CONDUCT OF LAWYERS IN HONG KONG 54445 (1996).

32. See BETTY HO, HONG KONG CONTRACT LAW 493 (2d ed. 1994).

33. The Hong Kong government opposed the addition of the remedy of reinstatement to this legislation. For a discussion of the enactment of Hong Kong's first anti-discrimination legislation and the provision of the remedy of reinstatement in the Disability Discrimination Ordinance, see Carole J. Petersen, *Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335, 38385 (1996). For a discussion of the 1997 amendment that added the remedy of reinstatement to the Sex Discrimination Ordinance, see Carole J. Petersen, *Hong Kong's First Anti-Discrimination Laws and Their Potential Impact on the Employment Market*, 27 H.K. L.J. 324, 34951 (1997).

34. *Jill Spruce & the University of Hong Kong*, [1991] 2 H.K.L.R. 444 (Ct. App.).

appealed to the Court of Appeal. The Court of Appeal held that the University's decision to terminate her employment was based upon her failure to observe its regulations on outside practice but that she was not contractually bound by these regulations. The Court of Appeal thus held that the dismissal was based upon an error of law and was "susceptible to an order of quash." However, the Court of Appeal exercised its discretion to decline to make an order of certiorari quashing the decision, noting that to issue such an order would be "tantamount to decreeing specific performance of a contract of personal service."³⁵ Of course, if courts strictly apply the rule against specific performance, then the entire system of academic tenure becomes largely ineffective as a means of protecting academic freedom.³⁶

The *Spruce* case also illustrates the danger of Hong Kong's costs rules. Although the Court of Appeal declined to quash the decision to dismiss Spruce, it ordered the University of Hong Kong to pay her legal costs, both for the appeal and for her original action in the High Court (presumably because it decided that the decision to dismiss her proceeded upon an error of law). However, Spruce then appealed the denial of her motion for an order to quash to the Privy Council (at that time the final court of appeal for Hong Kong). The University cross appealed against the order that it pay Spruce's legal costs. The Privy Council reversed the Hong Kong Court of Appeal, holding that the outside practice rules had been incorporated into the contract and that therefore the University had not made an error of law in deciding to terminate Spruce's employment.³⁷ The Privy Council then ordered Spruce, as the loser in the action, to pay the University's costs (before the High Court, the Court of Appeal, and the Privy Council).³⁸ It

35. *Id.* at 452. It should be noted that Spruce had been accused of a good deal more than just engaging in outside practice without permission, including canceling classes without sufficient notice and lying about the reason for canceling. However the Court of Appeal held that the decision to terminate her was susceptible to an order to quash because "[w]e cannot accept that the [University] Council would assuredly have resolved as it did had the soundness of [Spruce's] contention as to the terms of her contract been appreciated." *Id.*

36. This argument was made in an article that appeared after the Court of Appeal's decision. See W. S. Clarke, *Academic Tenure and the Protection of Academic Freedom*, 21 H.K. L. J. 374, 376 (1991). Clarke notes that Spruce did not claim that her academic freedom was infringed and that "sadly, the concept appears not to have been put before the court as relevant to its exercise of discretion." *Id.* It is possible, that in a case in which the dismissed academic alleged infringement of academic freedom, the court might be more willing to exercise its discretion to order reinstatement.

37. *Jill Spruce & The University of Hong Kong*, [1993] 2 H.K.L.R. 65, 71 (Privy Council).

38. *Id.* at 72.

was reported that Spruce owed the University more than HK \$3 million and that she disappeared from Hong Kong, abandoning her law practice.³⁹

Although the *Spruce* case was not about academic freedom, it was very big news in Hong Kong's academic and legal communities. In the minds of Hong Kong academics, the case stands for two principles: (1) the remedy of reinstatement is unlikely to be ordered; and (2) the financial risks of taking legal action far outweigh the potential benefits. The case makes it highly unlikely that even a tenured academic would take legal action against a university in Hong Kong.

This means that the primary restriction on university administrators who might wish to restrict academic freedom will be the fear of bad publicity that it would generate (both in Hong Kong and internationally). To that extent, it is useful to examine some of the recent cases in which academic freedom has allegedly been challenged and the reaction to these cases in the local and international press.

D. Examples of Specific Challenges to Academic Freedom

1. *The City University Incidents*

In the two years leading up to the resumption of Chinese sovereignty, Faculty of Law at the City University of Hong Kong has endured an unusually vicious internal dispute (even for academics). In the end, the leader of one faction (Professor Wang Guiguo, the faculty's first dean from mainland China) was forced to give up the deanship and a prominent member of the other faction (Professor Derek Roebuck, the faculty's first dean) was actually fired.⁴⁰

"Academic freedom," as such, was probably not the main cause of the turmoil in the Faculty of Law. The dispute concerned broader questions, including the direction of the Faculty of Law, its leadership, and the degree of control exercised by the dean. However, the dispute certainly raised issues that are relevant to academic freedom. For example, it demonstrated

39. See Ron Gluckman, *Battle for Disputed Funds Proves Futile*, S. CHINA MORNING POST, June 5, 1994, at 5; and Greg Torode, *Bid to Halt Bankruptcy Proceedings*, S. CHINA MORNING POST, Apr. 25, 1994, at 3.

40. See Alison Smith, *Row Sparks Upheaval on Legal Campus*, S. CHINA MORNING POST, Apr. 15, 1997, at 1. Initially Roebuck was simply notified that his contract would not be renewed. However, City University later decided to terminate him before the end of his contract, exercising its right to pay him three months pay in lieu of notice, so as to dismiss him "without cause assigned." See Derek Roebuck, *Why Did They Sack Me?*, SUNDAY MORNING POST, Apr. 20, 1997, at 9.

the vulnerability of academic staff who are employed on contract terms and the extent to which one or a few persons (such as the dean and head of department) can influence the contract renewal decision. It is understood that one of the complaints made by staff was that Professor Guiguo saw to it that the contracts of certain academic staff (both Chinese and expatriate) were not renewed reportedly because they had either fallen out of favor with him or had challenged him on particular issues.

The dispute at City University also raises the question of the extent to which a university should be allowed to censor damaging news about itself. There were frequent news stories about the dispute in the Faculty of Law, which damaged its reputation in the community and the legal profession. For example, Professor Roebuck publicized his claim that members of the Faculty of Law were being pressured to lower standards to accommodate students with inadequate English language skills. He claimed that he was asked to raise the marks of several students who had failed his contracts course and that when he refused, the course was taken out of his control and the students reassessed at a lower standard.⁴¹ Needless to say, this report caught the attention of the Law Society and may damage the employment opportunities of City University graduates. The bad publicity reportedly enraged the President of City University. Indeed, it is widely believed that the reason that Roebuck was ultimately fired was not so much the particular positions he took in City University itself, but rather the fact that he publicized the dispute.⁴² It has also been reported that City University tried to prevent bad publicity by actually barring reporters from conducting interviews on campus without prior approval.⁴³

One can certainly appreciate the frustration of university administrators when embarrassing disputes are aired in the press, particularly ones which call into question the quality of graduates. Yet given: (1) the centralized nature of Hong Kong's universities; (2) the trend away from tenure; and (3) the difficulty of taking legal action against one's university, press attention may be the strongest protection available to an academic who feels under threat. If an academic who believes that his or her autonomy (whether in the classroom or in research) is being restricted cannot make complaints in the press, then it will be extremely difficult for that academic to fight back.

41. Hedley Thomas, *A Law unto Themselves*, SUNDAY MORNING POST, Feb. 9, 1997, Agenda sec., at 1.

42. The University's reply to Roebuck, which was published alongside his article *Why Did They Sack Me?*, *supra* note 40, implies that he was terminated because of his decision to publicize his complaints.

43. May Sin-Mi Hon, *Academic Freedom Row over Clamp*, S. CHINA MORNING POST, Aug. 5, 1997, at 3.

Indeed, the importance of press attention was very clearly demonstrated in another incident involving City University. In July 1997 (a few weeks after the handover), City University re-issued regulations on outside practice to department heads reminding the staff of their obligations. The regulations required staff to seek approval before engaging in any form of outside practice. In and of itself, this was not remarkable. However, the definition of "outside practice" was extremely broad. The regulations classified outside practice into three categories: consultancies, commercial work, and general educational work. General educational work was defined to include: "occasional broadcast talks or interviews, preparation of manuscripts for books or journals, book reviews, [and] casual journalism."⁴⁴

Members of the Faculty of Law pointed out to the administration the inherent dangers in these regulations as early as 1995. Yet no effort was made to amend the regulations, leaving staff in a very vulnerable position. However, when the same regulations were reissued in July of 1997, the story was leaked to the press (no doubt by an unhappy member of the staff). City University was strongly criticized in local newspapers⁴⁵ and quickly announced that it would "tidy up" its regulations so as to make it clear that approval would be required only for paid work.

The President of City University held a press conference to dispel rumors that City University had been attempting to curb academic freedom. He insisted that "[w]e do not want to monitor what type of work they do or what they say. It's not the nature of the work, but the remuneration and time they spend that concerns the university."⁴⁶ However, given the fact that teachers had previously complained about the regulations, it is hard to believe that the broad scope of the regulations was merely a "mistake." It would appear that had it not been for the press coverage (and the fact that the story followed many other damaging stories about City University) the regulations might not have been amended.

2. *Patriotism in Education—the David Chu Incidents*

David Chu, a member of the controversial Provisional Legislative Council is known for his optimistic views of Hong Kong's return to China.

44. May Sin-Mi Hon, *Academic Freedom Row over Clamp*, S. CHINA MORNING POST, Aug. 5, 1997, at 3.

45. See Carmen Cheung, *City University Told to Explain Clamp on its Academics*, HONG KONG STANDARD, Aug. 9, 1997; S. CHINA MORNING POST, Aug. 5, 1997, at 18 (editorial).

46. May Sin-Mi Hon, *University to Tidy Rules for Outside Work*, S. CHINA MORNING POST, Aug. 7, 1997, at 4.

He has also publicly urged that "patriotic education" should be strengthened in Hong Kong. In the summer of 1997, Richard Baum, a Visiting Professor of International Studies at the Chinese University of Hong Kong, wrote a letter to the editor of the South China Morning Post suggesting that Chu's proposal for increased patriotism in education was "ill-considered."⁴⁷ Shortly after the letter was published, Chu wrote to Baum's departmental chairman at Chinese University complaining that Baum's "colonial arrogance" rendered him unfit to teach in Hong Kong.

This was not the only time that Chu had complained about a university teacher. He also wrote to Baptist University about statements made by Tim Hamlett, a lecturer in Baptist University's Department of Journalism. Hamlett had upset Chu when he took issue (in his column in the Sunday Morning Post) with a statement by Chu that Hong Kong people had been "overwhelmed" by the reunification celebrations. Hamlett argued that most people did not actually celebrate Hong Kong's return to China. Chu sent a fax to Hamlett, which Hamlett later described as "quite abusive" and "the rudest letter I have ever seen." More importantly, Chu sent copies of the fax to Hamlett's department head and the Vice-chancellor of Baptist University.

Fortunately, both institutions responded by issuing statements supporting academic freedom in general and specifically supporting the rights of academics to express opinions different from those of the local establishment.⁴⁸ Several articles criticising Chu were published in Hong Kong⁴⁹ and the South China Morning Post endorsed a suggestion (made by Professor Raymond Wacks of the University of Hong Kong Faculty of Law) for a special group monitoring academic freedom.⁵⁰ Chu was also criticized abroad, where the articles not only presented his actions as clear cases of infringement of academic freedom, but also implied that they were part of a general decline in freedom in Hong Kong. For example, the incident was described in one story in the international press as "the latest in a clash over individual freedoms in Hong Kong, five weeks after it returned to Chinese rule."⁵¹

47. Letter from Professor Richard Baum, S. CHINA MORNING POST, Aug. 4, 1997, at 18.

48. Shirley Kwok, *Colleges Defend Right to Criticise*, S. CHINA MORNING POST, Aug. 5, 1997, at 3.

49. See Gren Manuel, *Legislator Tried to Get Me Sacked: Don*, S. CHINA MORNING POST, Aug. 4, 1997, at 1; Fanny Wong, *Debate Helps to Stimulate Learning*, S. CHINA MORNING POST, Aug. 6, 1997, at 16.

50. *Open Debate*, S. CHINA MORNING POST, Aug. 5, 1997, at 18 (editorial).

51. See Graham Hutchings, *Academics Take on Hong Kong Leader*, THE DAILY TELEGRAPH, Aug. 6, 1997, at 12. The story was also published in Canada. See *Hong Kong Legislator Triggers Row over Academic Freedom*, VANCOUVER SUN, Aug. 6, 1997, at A12.

Initially Chu argued that his letters were not intended to intimidate the two academics but rather were just part of an open debate (although he declined to release his actual letters). Chu also denied that he was trying to put pressure on the universities and refused to acknowledge the significance of a legislator (particularly one that had been appointed by China) sending such letters to the academics' supervisors. The negative response in the press apparently caused him to rethink his position, as he did eventually publicly apologize to both the academics. However, Chu's apology mainly focused on the tone of his attack, stating that "at times I was very rude to them." He made it clear that he was not backing down from his call for increased patriotism in Hong Kong's educational system.⁵²

3. *Political Correctness and Taiwan*

The one thing that seems guaranteed to generate controversy and upset China is any statement that appears inconsistent with its "one China" policy. China's attitude toward this issue (and people's reaction to it) is a little bit like the story of the emperor's new clothes. It is obvious to everyone that Taiwan *functions* as a separate country with a separate government, separate military, and separate international relations (albeit often in unofficial terms). Yet if one wants to get along with China, one is expected to pretend that this is not so.

China's sensitivity over this issue was clearly demonstrated in June 1996, during the well-publicized interview of Lu Ping (China's main spokesperson on Hong Kong at the time) on Cable News Network (CNN). Lu Ping stated that despite the guarantee of free expression in the Hong Kong Basic Law, no one in Hong Kong would be permitted to advocate independence for Taiwan after July 1, 1997. Lu Ping attempted to draw an analogy to Hawaii, claiming that the United States would not allow the press to advocate its independence either. Needless to say, this was front page news in Hong Kong.⁵³ The story generated a great deal of bad press for China in Hong Kong (including some angry letters from Americans, eager to correct Lu Ping's understanding of American law). Later statements implied that Lu Ping had made a mistake in using the term "advocate," rather than "incite." But the issue is still very much alive in Hong Kong, as demonstrated by the ban on Taiwan flags during the "double ten" anniversary celebrations in

52. David Chu, *A Sorry Case for Patriotism in Schools*, S. CHINA MORNING POST, Aug. 7, 1997, at 18. See also *Still Punching on the Way Down*, S. CHINA MORNING POST, Aug. 10, 1997, at 10.

53. See Chris Yeung, *Lu Sets out Ground Rules for Press Freedom after 1997*, S. CHINA MORNING POST, June 1, 1996, at 1.

October 1997. Police officers removed Taiwanese flags from footbridges and the roadside, and the government may introduce legislation to expressly restrict the celebrations in 1998.⁵⁴

How then will academics handle the "Taiwan question"? One recent incident demonstrates the potential for conflict even in very mild academic statements. The South China Morning Post recently reported that the President of the University of Science and Technology sent an "email" message to academics, criticizing the title of a seminar they had organized on Taiwan.⁵⁵ The title was "Taiwan's political reform and its relationship to mainland China." The President told the staff that they should instead use the term "Chinese mainland."⁵⁶ He explained, "It is important one gets used to using the right terminology since otherwise one would imply there is more than one China."⁵⁷

The Acting Head of the Social Sciences Department confirmed that she had received this message, but said that it arrived too late to amend the title. The article did not report whether she would have amended the title had time permitted. She refused to comment on whether the President was trying to influence academic discussion. However, several other academics were quick to criticize the President's action, complaining that it was an attempt to "intervene in freedom of expression." The President of the Professional Teachers' Union was quoted as stating that "universities should be a place to cultivate academic freedom. I don't see any reason why any words or topics should be banned." The President of the University (who, the newspaper took pains to point out, had been a "Beijing appointed Hong Kong advisor and a member of the Preparatory Committee") insisted that he had no intention of harming freedom of expression. In his opinion, "he was only pointing out a mistake . . . and reminding staff that 'Chinese mainland' was the correct term."⁵⁸

If the mild and rather ambiguous phrase "mainland China" (which is used all the time in conversation in Hong Kong) can arouse that much concern, one must ask how the President would have reacted if the title of the seminar had been: "Why Taiwan is and should remain independent of Mainland China." It appears that this issue may eventually present some

54. Baby Sung & Carmen Cheung, *Pro-Taiwan Groups Get Legal Warning*, HONG KONG STANDARD, Oct. 7, 1997.

55. Shirley Kwok, *'Mainland China' Term Gives Rise to Academic Angst*, S. CHINA MORNING POST, Sept. 16, 1997, at 1.

56. *Id.*

57. *Id.*

58. *Id.*

important tests of the extent to which academic freedom is protected in Hong Kong.⁵⁹

4. *Student Movements and Freedom of Expression on Campus*

Although the main focus of my discussion of academic freedom is the freedom of university teachers, the question of students' freedom on campus also deserves some comment.⁶⁰ Hong Kong students have not engaged in extensive political activism during the transition period (with the notable exception of the Tiananmen Square protests, which mobilized Hong Kong people generally). However, there have been some clashes between students and university administrations.

For example, students criticised their universities' vice-chancellors and presidents for agreeing to serve as Hong Kong Affairs Advisors and members of the Preparatory Committee while at the same time refusing to convey the opinions of students and staff. Students asked their vice-chancellors to express their opposition to the establishment of the Provisional Legislature. However, the vice-chancellors have refused to do so. Lah Wing-Wah has described these confrontations as follows:

The core issue of these conflicts on campus was a dilemma created in the co-option process. The vice-chancellors were selected because of their key positions in universities. Were it not for these positions, they might not have been chosen by the PRC Government. This was an argument used by Hong Kong students to request their university heads to represent their interests. However, the selected university heads were appointed in a personal capacity. This allowed them to express opinions, make decisions and vote without consultation with their university councils, teachers, or students.⁶¹

59. Similar issues may develop with respect to China's treatment of Tibet. It has been reported that some university publishers have practiced self-censorship by refusing to publish books concerning political issues related to Tibet. See Enoch Wong, *Local College Head Tells of Staff Self-Censorship*, HONG KONG STANDARD, Nov. 6, 1996 (quoting Frank Ching of the Far Eastern Economic Review). The same article quotes the President of Lingnan College as stating that he was aware of self-censorship by academics. To his credit, the President stated that the heads of Hong Kong's institutions should "guide our staff to maintain . . . academic freedom." *Id.*

60. Neither the Joint Declaration nor the Basic Law expressly address the issue of student dissent on campus (although they do provide for freedom of choice in education). However, students can rely on the general provisions discussed above relating to freedom of expression, assembly, and political activity. Students engaged in research could rely on the provisions discussed relating to freedom of research, as those provisions are not limited to teachers.

61. Law Wing-Wah, *supra* note 10, at 58.

Other conflicts have arisen when students have expressed their own opposition to China on campus. For example, in 1996 the University of Hong Kong removed students' slogans condemning the Tiananmen Square massacre. The administration claimed that the slogans had been placed on the pavement without permission and that while it had shown leniency for seven years, the time had come to remove them. The students complained, repainted the slogans, and have insisted on conducting their own poll of the University community on the issue.⁶² The issue has generated a good deal of press coverage, which appears to have caused the Vice-Chancellor to back down somewhat from his initial insistence that the slogans simply had to go and that prior consultation was not required.⁶³

University of Hong Kong students also insisted on bringing onto campus the controversial "Pillar of Shame" sculpture (honoring those killed in Beijing in June 1989). The Vice-Chancellor initially refused permission. But when the truck hired by students arrived at the campus gates late one night (accompanied by television crews) he ultimately backed down and agreed to let them display it. Indeed, he wisely took the opportunity to reassure students (on camera) that the University would continue to be a place of free speech and academic freedom. Other universities in Hong Kong have also agreed to allow either the sculpture or other emblems (such as paintings of the "Goddess of Democracy") on campus. Once again, the importance of press attention was clearly demonstrated. The issue was well covered in the press and the universities did not want to be saddled with a reputation for restricting free expression.

III. THE LEGAL PROFESSION

A. The Structure and Independence of the Profession

The importance of maintaining an independent legal profession is widely recognized in Hong Kong. Even the Chinese government probably realizes that the legal profession is essential to Hong Kong's continued economic

62. Letter from Hong Kong University Students' Union to all Academic and Non-Academic Staff (Oct. 10, 1997) (on file with the author).

63. See Enoch Wong, *Cheung Says June 4 Slogans Must Go*, HONG KONG STANDARD, Oct. 17, 1996; Rodger Lee, *Democracy Slogans to Stay as University Holds Survey*, S. CHINA MORNING POST, Nov. 26, 1996, at 4; Enoch Wong, *Students Defy Campus Ban on Slogans*, HONG KONG STANDARD, June 4, 1997; Wanda Szeto, *Students Repaint June 4 Slogans*, S. CHINA MORNING POST, Aug. 18, 1997, at 4.

success. Companies will be less willing to invest in and trade with Hong Kong if they cannot rely upon the impartiality of the legal system, which requires both an independent judiciary and a strong legal profession.

Hong Kong still has a divided legal profession, with separate professional bodies for solicitors (the Law Society) and barristers (the Bar Association).⁶⁴ The main statute governing the profession is the Legal Practitioners Ordinance. It vests the Law Society and Bar Association with significant autonomy and powers, and thus the legal profession is largely self-regulating.

The Basic Law expressly protects the right to legal representation. Article 35 states that "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts . . ."⁶⁵ Article 94 provides that it will be the responsibility of the Hong Kong government (rather than the national government) "[o]n the basis of the system previously operating in Hong Kong . . . [to] make provisions for local lawyers and lawyers from outside Hong Kong to work and practice in the region."⁶⁶ The Basic Law does not specifically recognize the right of the legal profession to self-regulate. However, Article 142 does provide for the continued recognition and autonomy of professional bodies generally.⁶⁷ Moreover, the reference in Article 94 to "the system previously operating in Hong Kong" strongly implies that the legal profession should continue to exercise considerable autonomy.⁶⁸

Most lawyers in Hong Kong are solicitors⁶⁹ and the bulk of legal work is done by them. Solicitors may appear in the lower courts (magistrates courts and the District Court), and also in the Court of First Instance (formerly the High Court) on the hearing of appeals from magistrates courts. Only barristers have a general right of audience in the Court of First Instance and in the Court of Appeal. Barristers are specialists in advocacy. They

64. Law students in Hong Kong pursue the same academic training. This is generally a three-year L.L.B. plus a one-year Postgraduate Certificate in Laws (the PCLL). Upon completion of the PCLL, a graduate must choose whether to become a solicitor (in which case he or she must complete two years of trainee solicitorship) or a barrister (in which case he or she must complete one year of pupillage). It is possible to switch to the other side of the profession, but one cannot practice as both a solicitor and a barrister at the same time.

65. BASIC LAW, *supra* note 2, art. 35.

66. BASIC LAW, *supra* note 2, art. 94.

67. BASIC LAW, *supra* note 2, art. 142.

68. BASIC LAW, *supra* note 2, art. 94.

69. Recent reports indicate that there are about 3500 practicing solicitors in Hong Kong, as compared to only about 600 practicing barristers. See SANDOR & WILKINSON, *supra* note 31, at 3.

have a right of audience in all courts, give written opinions on questions of law, and prepare certain documents relating to litigation.

The Law Society of Hong Kong has long argued that solicitors should be given greater rights of audience in the higher courts. The Bar Association views any such proposal as a step towards fusion of the profession, which it strongly opposes. It is arguable that abolishing the Bar's monopoly in the higher courts would make it more difficult for young barristers to obtain work and discourage the best graduates from becoming barristers. Over time, this could weaken the Bar and decrease the public's access to a pool of specialists in litigation who are not tied to a particular firm.

The Bar is correct in arguing that it can be very difficult for a young barrister to earn a living. Barristers are required (by the Bar Code) to work as solo practitioners. They may not form partnerships or work in a firm (although they may share the expenses of maintaining an office, known as "chambers").⁷⁰ The primary justification for this rule is that the formation of partnerships would reduce the choice of barristers, as those in the same partnership could not represent conflicting interests. This argument is particularly compelling in the context of Hong Kong, as there are only about 600 practicing barristers, less than 50 of whom are Senior Counsel.⁷¹

Another important ethical rule is that a barrister cannot be approached directly by a client, but must be retained by the client's solicitor. This rule is purportedly justified by the need for barristers to maintain their impartiality and independence.⁷² However, it has been criticized as inefficient and unduly expensive and certain exceptions are now recognized. For example, representatives of certain professional bodies (such as the Hong Kong Society of Accountants) now have direct access to barristers.⁷³

B. The Status of Foreign Lawyers and Law Firms in Hong Kong

The regulation of foreign lawyers in Hong Kong has been an extremely controversial issue in the past decade. As recently as 1992, Hong Kong was

70. BAR CODE, *supra* note 31, ¶ 28, 81-83.

71. Barristers are graded into senior barristers and junior barristers. Prior to July 1, 1997, senior barristers were known as "Queen's Counsel." They are now referred to as "Senior Counsel."

72. See *Consultation Paper on Legal Services in 1995* ATTY GEN.'S CHAMBERS, HONG KONG GOVERNMENT ¶ 2.35. It has also been argued that the rule makes it easier for barristers to specialize in advocacy, in that they do not have to devote large amounts of time to meeting with the lay client. *Id.* ¶ 2.34.

73. See BAR CODE, *supra* note 31, Annex 19 (Direct Professional Access Rules and Recommended Standard Terms of Engagement).

described as "one of the most restrictive jurisdictions" with respect to the licensing of foreign law firms and the qualification of foreign lawyers to practice in Hong Kong.⁷⁴ Foreign law firms were permitted to open offices in Hong Kong (beginning in 1972), but were subject to strict limitations. There was also no examination or other procedures by which a foreign lawyer could be admitted to practice as a Hong Kong lawyer.

Lawyers from commonwealth and European Community jurisdictions were fortunate in that the United Kingdom provided a "back door" through which they could be admitted in Hong Kong. They could take the English Qualified Lawyers Transfer test, become admitted as a solicitor in the United Kingdom, and then be admitted in Hong Kong without any additional training or examination. However, American lawyers were not eligible to take the English Qualified Lawyers Transfer Test. Thus American firms with offices in Hong Kong petitioned for: (1) the right to employ Hong Kong solicitors in their firms; and (2) an examination by which they could themselves qualify as Hong Kong lawyers.

For many years, the Law Society of Hong Kong strongly opposed such petitions.⁷⁵ The fear of competition from the American firms was probably the most significant consideration in the debate. However, the issue of the status of PRC lawyers after 1997 was also raised. Some representatives of the Law Society argued that the rules could not be relaxed for American lawyers without also relaxing them for PRC lawyers. It was even claimed that this would give PRC lawyers a "legitimate means of seizing control of our legal system."⁷⁶

Eventually, however, the Law Society softened its position and a new regulatory scheme was developed. The most notable reform is that foreign lawyers can now gain admission by passing a specified examination. The new scheme brings the law relating to the admission of solicitors into line with Hong Kong's obligations under the General Agreement on Trade in Services ("GATS").⁷⁷ In contrast, the criteria for admission as a barrister has not yet been liberalized and there is no examination by which a foreign lawyer can gain admission as a Hong Kong barrister. However, it is recognized that the current law is inconsistent with GATS and the Hong

74. Alison E. W. Conner, *Regulation of Foreign Lawyers in Hong Kong*, 22 HONG KONG LAWYER 132 (1992).

75. *Id.* at 133.

76. S. CHINA MORNING POST, July 13, 1991 (quoting Simon Ip). Conner cites this and other "scare stories" on the subject in her article, *supra* note 73, at 145.

77. For a summary of the new regulatory scheme, see Emme Waller, *Entry to the Legal Profession and the General Agreement on Trade in Services (GATS)*, in LAW LECTURES FOR PRACTITIONERS 1995 145-46 (Janet Burton ed., 1995).

Kong Bar Association is expected to propose appropriate amendments in the near future.⁷⁸

C. The Legal Profession's Role in the Transition Period

Like academia, the Hong Kong legal profession has been very involved in the transition to Chinese sovereignty. Both the Law Society and the Bar Association have drafted numerous submissions on legal and political developments, including the debates over the enactment of the Bill of Rights Ordinance (in 1991) and the Court of Final Appeal Ordinance (in 1995). While both professional bodies have stood up for the rule of law and human rights, the Bar Association appears to be more willing to take (and stick to) positions that China opposes. This may be attributable to the fact that solicitor firms are increasingly serving clients doing business in China –and therefore cannot risk being too antagonistic towards the Chinese government.

In addition to lobbying, the legal profession has had some direct input into lawmaking in Hong Kong. Since the introduction of "functional constituencies," the legal profession has enjoyed representation in the Legislative Council. Barrister Martin Lee got his start in Hong Kong politics as the first representative elected from the legal profession.⁷⁹ He was followed by solicitor Simon Ip. When Ip announced that he would not stand for re-election in 1995, former Law Society President Donald Yap announced that he would run for the seat⁸⁰ and it was widely assumed that he would win. However, Yap received some criticism for appearing too willing to agree with China on transitional issues. Yap had been appointed by China as a Hong Kong Affairs Advisor and he stated (in answer to a question at a forum at City University) that he would be willing to sit on a provisional legislature when China dissolved the elected legislature (as it had already pledged to do, in response to the democracy reforms successfully proposed by Governor Patten).⁸¹

In contrast, one of Yap's opponents, barrister Margaret Ng (a more outspoken supporter of human rights and democracy, who has never shown any fear of criticizing China) stated that she would flatly refuse to sit on any

78. *Id.* at 147.

79. Lee gave up representing the legal functional constituency to run, successfully, in the first direct elections' to the Legislative Council in 1991. He was re-elected in 1995 but lost his seat in 1997 when the elected legislature was dissolved by China. However, he is still a leader in the Democratic Party and will almost certainly win a seat in the 1998 elections.

80. *See Yap to Stand at Forthcoming Elections*, HONG KONG LAWYER, July 1995, at 7.

81. Lok Wong, *Lawyers Draw Battle Lines*, S. CHINA MORNING POST, Aug. 25, 1995, at 6.

such body. Ng unexpectedly won the seat (and by a significant margin).⁸² Since solicitors far outnumber barristers in Hong Kong (by a ratio of at least 5 to 1), the majority of solicitors must have voted for Ng, rather than for their former president. It would appear that regardless of what positions solicitors feel they must adopt publicly, when they voted by secret ballot in 1995 they wanted a strong spokesperson in the legislature, one that would not be too eager to compromise with China. Of course, Ng lost her seat when China dissolved the legislature in 1997. It will be very interesting to see who is elected to represent the legal functional constituency in the 1998 elections.

D. Representation of Controversial Clients

One quite significant event raised concerns about the willingness of solicitors' firms to represent clients who are unpopular with the Chinese government. In 1993, Simon Li, a former justice of the Hong Kong Court of Appeal, was reported to have stated that Martin Lee and Szeto Wah (leaders of Hong Kong's Democratic Party) as well as Emily Lau and Christine Loh (also liberal legislators at the time) were unfit to serve in Hong Kong's legislature after 1997. He also accused Martin Lee and Szeto Wah of inciting the Hong Kong public to stage a run on the Bank of China after the Tiananmen Square massacre in June 1989. Lee and Wah denied the latter claim and prepared to institute libel proceedings in Hong Kong.

It should not have been difficult for them to find a firm of solicitors willing to act for them. Their party had done very well in the 1991 elections and enjoyed (and continues to enjoy) strong public support. Moreover, Martin Lee is a distinguished barrister and a former chairperson of the Bar Association. As noted above, he previously had been elected to represent the entire legal profession in the Legislative Council.

Nonetheless, Martin Lee claimed that eighteen different firms declined to represent him, reportedly because they did not want to offend former Justice Li and the Chinese government, and thereby risk losing clients in the China trade and investment business.⁸³ Martin Lee was originally appointed by China to be a member of the Basic Law Drafting Committee. But since June 4, 1989, he has been a major thorn in China's side. He joined in the protests against Beijing in 1989 and since then has continued to clash with

82. Jonathan Braude, *Green about the Hats*, S. CHINA MORNING POST, Sept. 22, 1995, at 23.

83. See Robin Fitzsimons, *Who Will Defend Hong Kong?*, THE TIMES, Sept. 7, 1993, Features.

China on transitional matters (such as the drafting of the Basic Law, which he claimed did not comply with the Joint Declaration).

Lee eventually found a firm that was willing to act for him, but the issue did not go away. Polls indicated that the controversy had badly damaged the public's faith in lawyers.⁸⁴ A public seminar was held on the issue.⁸⁵ There was a call for the Chinese government to assure solicitors that they would not be penalized if they represented clients who opposed the government.⁸⁶ It was also suggested that the Law Society should require solicitors to explain to the client the firm's reason for refusing to take a case and to prohibit firms from refusing cases for political reasons.⁸⁷ This was accomplished, through an amendment to the Solicitors' Guide which now provides that a solicitor may not refuse to accept instructions on the basis of the potential client's political beliefs.⁸⁸

Perhaps the most significant result of the controversy, however, is that it has given the Bar Association additional ammunition in its fight against fusion of the legal profession. As noted above, barristers work as solo practitioners and are not permitted to form or join firms. They work on individual cases and do not develop permanent clients, whose interests might conflict with those of a new client. Barristers also work according to the "cab-rank" principle, which means that they must offer their services to the first client who asks for them and cannot choose cases according to their chances of success or other personal considerations.⁸⁹ As a result, they are less likely to feel pressure to refuse to represent a client who is unpopular with the local or national governments. Thus, in Hong Kong the debate over rights of audience for solicitors has taken on a dimension that would not exist in other jurisdictions. As one local barrister and academic has noted, the

84. See *Public's Faith in Lawyers Falls: Poll*, S. CHINA MORNING POST, Aug. 1, 1993, at 2.

85. The seminar papers on the debate were published in *THE RIGHT TO REPRESENTATION* (Raymond Wacks ed., 1993).

86. For example, legislator Jimmy McGregor called upon Lu Ping, the Director of China's Hong Kong and Macau Affairs Office, to reassure solicitors that China "has no objection to cases being taken which are politically sensitive." See S. Y. Yue, *Pledge Sought on Rule of Law*, S. CHINA MORNING POST, Aug. 20, 1993, at 7.

87. *Id.*; see also Robin Fitzsimons, *Who Will Defend Hong Kong?*, THE TIMES, Sept. 7, 1993, Features.

88. HONG KONG SOLICITOR'S GUIDE Principle 5.01. Race, color, ethnic or national origins, sex, and religion are also listed as prohibited grounds for refusing to act. For a general discussion of the issue, see SANDOR & WILKINSON, *supra* note 31, at 100-02.

89. BAR CODE, *supra* note 31, ¶ 21, states that a "practising barrister is bound to accept any brief to appear before a Court in the field in which he professes to practise at his usual fee having regard to the type, nature, length and difficulty of the case. Special circumstances such as a conflict of interest, or the possession of relevant and confidential information may justify his refusal to accept a particular brief." For a discussion of the "cab-rank" principle and exceptions to it, see SANDOR & WILKINSON, *supra* note 31, at 509-16.

debate on eliminating the Bar's monopoly has "shifted from the merits of the proposal to the threat to the existence of an independent Bar."⁹⁰

To give the legal profession credit, lawyers have demonstrated a willingness thus far to take controversial cases since July 1997. For example, in the recent case challenging the legality of the Provisional Legislative Council,⁹¹ the Director of Legal Aid (a government department) declined to brief leading counsel, despite the request of the Court of Appeal that it do so in view of the important constitutional issues. Fortunately, barristers Gladys Li, Margaret Ng, and Paul Harris (who were sitting in the visitors gallery with wigs and gowns ready) offered to assist the court on the issue of the legality of the Provisional Legislative Council. The court agreed and expressed its appreciation.⁹²

In a more recent and ongoing case, many lawyers have offered to represent children who are eligible for right of abode in Hong Kong under the Basic Law and are challenging the legality of an ordinance that was enacted by the Provisional Legislative Council (with the blessing of the Chinese government) to restrict their entrance into Hong Kong.⁹³ Interestingly, the President of the Law Society issued a circular to all solicitors firms suggesting that members might assist these children on a pro bono basis. The circular caused some controversy and some solicitors queried "why the Law Society had voluntarily committed its members to fighting against the Government of the Hong Kong Special Administrative Region."⁹⁴ In responding to the controversy, the President of the Law Society acknowledged the difference between the Law Society and the Bar—while the Bar had already publicly criticised the ordinance as a violation of the children's rights, the Law Society was divided on the issue. However,

90. Johannes Chan, *To Change or Not to Change: the Crumpling Legal System*, in THE OTHER HONG KONG REPORT 1996, at 19 (Nyaw Mee-kau & Li Si-ming eds., 1996).

91. HKSAR v. Ma Wai Kwan David, [1997] 2 H.K.C. 315 (Ct. App.).

92. HKSAR v. Ma Wai Kwan, [1997] 2 H.K.C. 315, 321–22 (Ct. App.). The Director of Legal Aid has been criticized for refusing to grant legal aid in a case of such constitutional significance. See Johannes Chan, *Amicus Curiae and Non-Party Intervention*, 27 H.K.L.J. 391, 392–93. The incident adds weight to the long-standing argument that the provision of legal aid should be made independent of the government.

93. For the first decision in this challenge (by the Court of First Instance, which was formerly called the High Court), see Cheung Lai wah et al. v. Director of Immigration, [1997] A.L. No's 68, 70, 71 & 73. The Court of First Instance largely upheld the ordinance, but held that one provision (which discriminated against children born out of wedlock) violated the Basic Law and was therefore invalid. For a critique of the decision and the ordinance, see Eric Cheung, *Undermining our Rights and Autonomy*, 27 H.K.L.J. 297 (1997). The appeal on the decision is expected to be heard in the Court of Appeal in 1998.

94. See Anthony Chow, *Defending the Right to Defend*, HONG KONG LAWYER, Aug. 1997, at 1.

he wisely urged solicitors to separate their views of the ordinance from their professional obligations:

[W]e lawyers are under a duty to preserve the rule of law in Hong Kong and one way of doing so is to ensure that every deserving person be afforded the opportunity to defend his or her rights. The right to defend should not be denied because of a lack of means.⁹⁵

Still, there is no denying that solicitors who represent the children in their challenge may be putting their firms at risk of losing certain clients. In such a climate, there is a strong argument for preserving the divided profession in Hong Kong, as well as the particular rules that differentiate barristers from solicitors (such as the rule against partnership and the cab-rank rule). These rules may appear rather archaic, but they protect barristers from some of the business pressures affecting solicitors. To that extent, they help to preserve the independence of the Bar. This not only helps to ensure the right to legal representation, but also allows the Bar to be a more assertive critic of government actions that may threaten individual liberties in Hong Kong.

IV. LANGUAGE AND INTERNATIONAL LINKS

An additional issue facing both academia and the legal profession is the question of language. As a colony, Hong Kong was required to use English as the language of both law and higher education. Needless to say, this imposed significant injustice and hardship. It was only after the signing of the Joint Declaration that the government finally began the long process of translating the laws of Hong Kong into Chinese. Thus, until quite recently, the majority of the people of Hong Kong could not read the laws.⁹⁶ Legal proceedings were also conducted in English and a defendant who did not speak English had to rely upon a translator to follow his or her own trial. A person was also required to be fluent in English to sit on a jury, making juries unduly representative of expatriates and professionals.⁹⁷ These injustices reveal some of the weaknesses in Britain's frequent claim to have

95. *Id.*

96. The first official Chinese translation of a Hong Kong Ordinance was declared authentic in 1992. The process of translation was not completed until May 1997, six weeks before the transfer of sovereignty. See CHINESE DRAFTING AND TRANSLATION UNIT (Law Drafting Division, Legal Department, Hong Kong Government); *Unprecedented Achievement*, HONG KONG LAWYER, July 1997, at 28.

97. See PETER DUFF ET AL., JURIES: A HONG KONG PERSPECTIVE (1992).

established the "rule of law" in Hong Kong, for accessibility of the law is one of the most important principles of the rule of law.

Under the Basic Law, both English and Chinese can be used in the legal system and Hong Kong is now grappling with the difficult task of how to implement a bilingual legal system. Many lawyers are concerned that the legal system never will be truly bilingual, but rather an awkward mix of the two languages. The laws of Hong Kong are now published in both languages, but the translations are not always perfect (and differences between the meaning of the Chinese and English versions of a statute have already been the subject of appeals). Moreover, Hong Kong is a common law system and many of its principles can only be found in the decisional law. Although efforts are being made to create textbooks and digests of the common law in Chinese, it is questionable how well they can really capture the enormity of the common law. It is also in the interest of Hong Kong to maintain its links to other jurisdictions and to look to them for new developments in the common law.

Court proceedings can now be held in Chinese, but many magistrates and judges still do not speak Chinese. A high percentage of Hong Kong lawyers are bilingual, but not all of them are comfortable practising law in Chinese. This is understandable, as they learned their law in English and are accustomed to practising in English.

The question of language in education is even more controversial. English is the official language of all the universities in Hong Kong, except for the Chinese University of Hong Kong (which is considered bilingual). Many Hong Kong students also attend secondary schools that teach in English. Yet it has long been argued that Hong Kong students should be learning in their "mother tongue," as many are failing to learn important subjects because they are struggling with English. It has also been noted that many teachers in Hong Kong are not entirely proficient in English. Thus teachers often use a "mixed mode" in their lessons, despite the fact that their students are required to write their examinations entirely in English.⁹⁸

The Education Commission therefore decided as early as 1990 to move towards a system in which mother-tongue education would be the norm in government schools.⁹⁹ That decision is now being implemented and the government has ordered many schools to switch to Chinese (unless the

98. For a discussion of these and other arguments in favor of mother-tongue teaching in Hong Kong, see David C. K. Cheung, *Why Mother-Tongue*, in *DIFFERENCES AND IDENTITIES: EDUCATIONAL ARGUMENT IN LATE TWENTIETH CENTURY HONG KONG* (Anthony Sweeting ed., 1990).

99. C. K. Lau, *Educators Register Disquiet*, *S. CHINA MORNING POST*, Feb. 17, 1998, at 15.

school applies for and receives an exemption).¹⁰⁰ The government's policy is probably a sound one, but schools (and parents) are resisting. Many schools that were denied an exemption from the requirement to switch to Chinese have appealed the decision.¹⁰¹ Some of their objections are quite pragmatic. For example, teachers claim that all their materials are in English and while they can speak Chinese, they are not prepared to suddenly start teaching their subject in Chinese. But other objections are more emotional. Many schools, parents, and students clearly view being forced to switch to Chinese as a downgrading of a school's status in the community. Others have argued that the use of English is an important tradition in their school, which they should not be forced to abandon. In one letter to the editor a university student described how she had wept when she learned that her former secondary school would be forced to give up teaching in English.

Another reason for the resistance to mother-tongue teaching in secondary schools is the fact that parents and students believe that attending an English language secondary school is the best way to gain admission to a university and thus a successful career.¹⁰² Of course, this begs the question—should mother tongue teaching be brought to the universities as well? It is a difficult question to answer and this brief discussion cannot do it justice. On the one hand, English was imposed on Hong Kong by a colonial regime and it is not the language of most Hong Kong people. On the other hand, English is now a link between Hong Kong and the rest of the world. The academic community of our universities is currently considered highly international, not only in terms of its composition, but also in terms of its activities. Postiglione's 1993 survey found that a very high percentage of academics were publishing articles and books abroad, collaborating with academics from outside Hong Kong, and travelling abroad for conferences, research, and faculty exchanges. Of course, input from outside Hong Kong (by foreign academics and students) is also very important to maintaining Hong Kong's international links and outlook, which in turn help to maintain academic freedom. Indeed, in Postiglione's view, the "durability of

100. Numerous articles have appeared in Hong Kong on this issue. For three articles that summarize the debate, see SUNDAY MORNING POST, Dec. 14, 1997, Agenda 1-2.

101. Fourteen of the 20 secondary schools who appealed the decision that they must switch to Chinese were successful in their appeals and will be allowed to continue to teach in English. See *14 Schools Win Battle to Teach in English*, S. CHINA MORNING POST, Mar. 14, 1998, at 1. The Government has offered extra financial support to the schools who are being forced to switch to Chinese. However, it appears that several schools will continue to lobby for permission to teach in English. See *Extra Aid Fails to Win over Some Schools*, S. CHINA MORNING POST, Mar. 14, 1998, at 4.

102. Transferring to one of the many private international schools is not an option for most Hong Kong students, due to the high school fees.

academic freedom will certainly be related to the degree to which the academic profession in Hong Kong maintains a viable international dimension."¹⁰³

The opportunities for global interaction will decrease if Hong Kong's universities ever switch entirely to Chinese. For this reason, it is likely that English will continue to play a significant role in higher education, despite the colonial overtones (and the fact that this makes it harder to persuade parents of the value of mother-tongue teaching in secondary schools). At the same time, there will also be increased emphasis on Chinese language skills, putting ever greater demands on our students. In colonial Hong Kong, students could afford to slack off a bit on their written Chinese, as the key to a successful career was English. Now our students are increasingly expected to be truly bi-literate (Chinese and English) and also tri-lingual (English, Cantonese, and Mandarin). It is only natural that the same skills eventually will be expected of their teachers as well.

V. CONCLUSION

Unlike other autonomous regions in the world, Hong Kong does not represent a racial or religious minority within China. Most Hong Kong people are Chinese—their ethnic background is substantially similar to that of people from the rest of southern China. Thus, Hong Kong's claim to the right to autonomy cannot be based upon the need to protect a minority culture.¹⁰⁴ Rather, the Hong Kong people are asserting the right to maintain a way of life that must appear extremely privileged to other Chinese, one which (ironically) was established while Hong Kong was under the control of an imperial power.¹⁰⁵ Of course, in the long term Hong Kong people hope that their freedoms will be enjoyed by all of China. But in the short term they know that this is unrealistic. Thus, Hong Kong is in a very precarious position: a former colony, reunited with the motherland, expected to embrace her—yet desperately trying to maintain the differences and the distance between them.

103. Postiglione, *supra* note 8, at 262.

104. See GHAI, *supra* note 7, at 179–84 for a discussion of the extent to which this factor may weaken Hong Kong's moral claim to autonomy.

105. Of course many of the important reforms under British rule (such as the enactment of the Bill of Rights Ordinance, the introduction of elected seats in the Legislature, and the repeal of certain draconian laws) did not occur until after the signing of the Joint Declaration in 1984. Still, even before these reforms, it is undeniable that the people of Hong Kong enjoyed far more freedom and opportunities than those across the border in China.

From the point of view of the Chinese government, the only compelling reason to grant Hong Kong special status and autonomy is the need to maintain its economic system. But from the point of view of the Hong Kong people, much more than just a free market is at stake. They are also fighting to maintain their social and political freedom. Open debate, critical education, and an impartial legal system are essential elements of that freedom. Thus academia and the legal profession have an important role to play in the effort to maintain Hong Kong's freedoms and way of life. Hopefully these two professions can rise to the challenge, protect their independence, and be effective institutions of autonomy in the new Hong Kong.